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Supreme Court, U.S.
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No. 03-968

In the Supreme Court of the United States

SHERBROOKE TURF, INC.,

Petitioner,

v.

MINNESOTA DEPARTMENT OF TRANSPORTATION, et al.,

and

UNITED STATES OF AMERICA, et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF IN OPPOSITION

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BRIEF OF RESPONDENTS MINNESOTA DEPARTMENT OF TRANSPORTATION AND CAROL MOLNAU IN HER CAPACITY AS THE MINNESOTA COMMISSIONER OF TRANSPORTATION IN OPPOSITION

Respondents Minnesota Department of Transportation and Carol Molnau in her capacity as the Minnesota Commissioner of Transportation (collectively "MnDOT") respectfully request that this Court deny the petition for writ of certiorari, seeking review of the United States Court of Appeals for the Eighth Circuit's opinion in this case. That Opinion is reported at 345 F.3d 964 (8th Cir. 2003), and is reproduced in the Petitioner's Appendix ("Pet'r App.") at 1.

STATEMENT OF THE CASE

In 1998, Congress passed the Transportation Equity Act For The 21st Century ("TEA-21"), Pub. L. No. 105-178, 112 Stat. 107 (1998), which is the most recent federal transportation funding statute requiring recipients of federal funds to implement a Disadvantaged Business Enterprise ("DBE") program. The United States Department of Transportation ("USDOT") promulgated federal regulations for the implementation of a TEA-21 DBE program by recipients of federal funds in 49 C.F.R. pt. 26. To receive over $300 million in TEA-21 federal highway funds each year, MnDOT must implement the TEA-21 DBE program in accordance with the regulations, subject to USDOT oversight. *See* 49 C.F.R. pt. 26 (2003).

The Federal Government narrowly tailors the TEA-21 DBE program to its nationwide compelling interest, in part by requiring each recipient of TEA-21 funds to measure its contracting market using a two-step process to establish: (1) the baseline availability of DBEs and (2) adjustments for the effects of past discrimination in the recipient's contracting market. 49 C.F.R. § 26.45(c)-(d) (2003). Upon USDOT

approval, the recipient must use that result as its overall annual goal for DBE participation on TEA-21 funded projects. 49 C.F.R. § 26.45(f)(1).

Sherbrooke appears to misunderstand MnDOT's annual goal-setting methodology for Fiscal Year 2001 and the Eighth Circuit's findings relating thereto. Pet. at 3. To meet its 49 C.F.R. § 26.45 obligation for Fiscal Year 2001, MnDOT commissioned the National Economic Research Associates ("NERA") to study MnDOT's contracting market. Pet'r App. at 15-16. The NERA study did not measure merely the number of DBE firms present in MnDOT's market as Sherbrooke claims; rather the NERA study included both steps of the 49 C.F.R. § 26.45 measurement: baseline availability and adjustments for past discrimination. *Id.* Using the findings of the NERA study, MnDOT set its Fiscal Year 2001 annual goal at 11.6%. *Id.* Not only did MnDOT comply with the regulations in the past, there also is no evidence that MnDOT will disregard 49 C.F.R. § 26.45 in the future or that USDOT will fail to enforce its regulations by rejecting or modifying MnDOT's annual goals if necessary.

The regulations require recipients to use race-neutral[1] measures to assist DBEs and other small businesses. 49 C.F.R. § 26.51 (2003). Recipients must also estimate the amount of DBE participation that will be realized each year through race-neutral means. *Id.* MnDOT based its Fiscal Year 2001 race-neutral estimate on the level of DBE participation in the market during Fiscal Year 1999 when MnDOT was enjoined from administering the federal race-conscious program. Pet'r App. at 16. DBE participation during that year was 2.25%, from which MnDOT estimated that it could achieve 2.6% race-neutral participation during

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[1] This case involves challenges to the racial and gender classifications of the TEA-21 DBE program. Unless otherwise specified, references to race will include gender as well.

Fiscal Year 2001. *Id.* Each recipient must constantly monitor and adjust its race-neutral estimate. 49 C.F.R. § 26.51(f).

Each recipient must then compare its annual goal to its race-neutral estimate. 49 C.F.R. § 26.51. To the extent that the annual goal is not projected to be met by the race-neutral estimate, the recipient must use contract goals throughout the fiscal year on federally funded projects to try to achieve the annual goal for DBE participation. 49 C.F.R. § 26.51(d). For Fiscal Year 2001, MnDOT subtracted the 2.6% race-neutral estimate from the 11.6% annual goal to determine that it must attempt to achieve 9% DBE participation in its federally funded contracts through contract goals. Pet'r App. at 16. The USDOT approved MnDOT's goal-setting methodology, annual goal, and race-neutral estimate for 2001. *Id.*

When a recipient must use contract goals, the recipient sets goals for TEA-21 projects based on factors such as subcontracting possibilities on the project. 49 C.F.R. § 26.51(e). Pursuant to the regulations, prime contractors bidding for a TEA-21 project with a contract goal must either achieve the contract goal or demonstrate good faith efforts to achieve the contract goal. 49 C.F.R. § 26.53 (2003). The regulations prohibit quotas. Pet'r App. at 13. On this record MnDOT has found good faith efforts each time a bidder has failed to achieve its contract goal, which demonstrates that the contract goals are not quotas. Garza Aff. ¶¶ 30-33.[2]

The regulations provide the methodology and criteria that recipients must use when certifying firms as DBEs. 49 C.F.R. § 26.61 (2003). The regulations require firms seeking DBE certification to be owned and controlled by a socially and economically disadvantaged person and also define who is a socially and economically disadvantaged

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[2] Pursuant to Sup. Ct. R. 12(7), MnDOT refers to the Affidavit of Michael E. Garza, which was submitted to the Eighth Circuit in the Appendix of Defendants-Appellees Minnesota Department of Transportation.

person. 49 C.F.R. § 26.67 (2003). Contrary to Sherbrooke's assertions, MnDOT requires all applicants for DBE certification, regardless of the owner's race, to submit with their applications proof of ability to work and disadvantage. Pet. at 23; Garza Aff. ¶ 14. Under the regulations, the race of the owner applying for DBE certification can create a rebuttable presumption of disadvantage during the certification process, but the race of the owner is not determinative. 49 C.F.R. § 26.61.

Sherbrooke did not produce any evidence that MnDOT ever has used or ever will use any racial classifications other than those required by the regulations when implementing the TEA-21 DBE program. Any firm that is owned and controlled by a socially and economically disadvantaged person is eligible for DBE certification regardless of the race of the owner. 49 C.F.R. § 26.61. Any firm that is not owned and controlled by a socially and economically disadvantaged person is not eligible for certification as a DBE, regardless of race. *Id.* There is no evidence that MnDOT ever has certified or ever will certify as a DBE a firm whose owner is not socially and economically disadvantaged, regardless of race. Further, there is no evidence that MnDOT ever has denied or ever will deny DBE certification to a firm whose owner is a socially and economically disadvantaged white male.

Sherbrooke brought the present suit seeking prospective injunctive relief from the District of Minnesota in the form of an order enjoining MnDOT from further implementation of the TEA-21 DBE program.[3] The District of Minnesota granted the USDOT's and MnDOT's motions for summary judgment and denied Sherbrooke's cross-motion

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[3] This case does not involve a challenge to Minn. Stat. § 161.321 (2002), which creates race-conscious classifications for exclusively state funded highway projects.

for summary judgment and motion for reconsideration. Sherbrooke then appealed the District of Minnesota's orders to the Court of Appeals for the Eighth Circuit.

The Eighth Circuit affirmed the District of Minnesota.[4] Citing *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995), the Eighth Circuit acknowledged that it must analyze the program under strict scrutiny. Pet'r App. at 7-8. After noting that the validity of the compelling interest identified for the classifications in TEA-21 was not challenged, the Eighth Circuit took "a hard look at the evidence" before Congress.[5] Pet'r App. at 8-9. After that review, the Eighth Circuit concluded that Congress did have a strong basis in evidence to support the racial classifications found in TEA-21. Pet'r App. at 9-10. The Court of Appeals for the Eighth Circuit noted that it reached the same conclusion as the Court of Appeals for the Tenth Circuit in *Adarand Constructors, Inc. v. Slater*, 228 F.3d 1147 at 1167-76 (10th Cir. 2000), *cert. granted then dismissed as improvidently granted*, 532 U.S. 941, 534 U.S. 103 (2001). *Id.* The Eighth Circuit then held that the compelling interest analysis should focus exclusively on the evidence before Congress. Pet'r App. at 10-11. Therefore, it did not require MnDOT to independently satisfy the compelling interest prong of strict scrutiny review. *Id.*

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[4] The Eighth Circuit consolidated Sherbrooke's appeal with a similar appeal from the District of Nebraska. *See Gross Seed Co. v. Nebraska Dep't of Roads, et al.*, No. 00-CV-3073, slip op. (D. Neb. May 6, 2002). Gross Seed Co. seeks certiorari from this Court in file No. 03-960.

[5] Sherbrooke asked the Eighth Circuit to conduct *de novo* review of the basis for the compelling interest. Pet'r App. at 9. Because the Eighth Circuit reached the same conclusion as the District of Minnesota--that there was a strong basis in evidence to support the racial classifications--remand for review under a different standard would be pointless. Pet'r App. at 10, 29.

The Eighth Circuit next analyzed the narrow tailoring of the TEA-21 DBE program. Pet'r App. at 12-15. Based on a full evaluation of the program, the Eighth Circuit found the TEA-21 DBE program was narrowly tailored on its face. Pet'r App. at 14-15. Finally, the Eighth Circuit found that the program remains narrowly tailored after MnDOT exercises its discretion in setting its annual goal. Sherbrooke now seeks review of the Eighth Circuit's ruling.

SUMMARY OF THE ARGUMENT

Certiorari should not be granted here because Sherbrooke fails to establish a conflict among the circuits or a conflict with relevant decisions of this Court. MnDOT addresses only questions three and four, the questions presented by Sherbrooke applicable to MnDOT's participation in the TEA-21 DBE program. Pet. at *i*. The Eighth Circuit properly stated the rule of law applicable here. Sherbrooke's allegations of misapplication of strict scrutiny by the Eighth Circuit do not establish a compelling reason to grant certiorari here.

ARGUMENT

I. THERE ARE NO CONFLICTS AMONG THE CIRCUITS WARRANTING THE COURT'S ATTENTION.

A. The Compelling Interest Analysis Of The Eighth Circuit Is Consistent With That Of The Other Circuits.

The decision of the Eighth Circuit does not conflict with other circuits that have addressed the issue of whether a state implementing a race-conscious federal program must independently satisfy strict scrutiny. The decision as it relates to application of the compelling interest prong of strict scrutiny is identical to the result reached by the other circuits.

See Harrison & Burrows Bridge Constructors, Inc. v. Cuomo, 981 F.2d 50, 57 (2d Cir. 1992) (State of New York need not satisfy either prong of strict scrutiny when implementing a federal program); *Ellis v. Skinner*, 961 F.2d 912, 916 (10th Cir.), *cert. denied*, 506 U.S. 939 (1992) (State of Utah need not satisfy either prong of strict scrutiny when implementing a federal program); *Tennessee Asphalt Co. v. Farris*, 942 F.2d 969, 975 (6th Cir. 1991) (State of Tennessee need not satisfy either prong of strict scrutiny when implementing a federal program); *Milwaukee County Pavers Assoc. v. Fiedler*, 922 F.2d 419, 423 (7th Cir.), *cert. denied*, 500 U.S. 954 (1991) (State of Wisconsin need not satisfy either prong of strict scrutiny when implementing a federal program). In support of its position that both prongs of strict scrutiny must be applied to both the Federal Government enacting the program and a state implementing the program, Sherbrooke cites several cases where a government enacts and implements its own program. Pet. at 19. These cases have no bearing on the compelling interest analysis required when a state implements a program enacted by the Federal Government.

Sherbrooke also argues that the regulations require MnDOT to measure its marketplace and that the Eighth Circuit failed to reach this issue. Pet. at 19-20. However, after noting that analysis of MnDOT's compliance with the regulations properly belongs in the narrow tailoring analysis, the Eighth Circuit analyzed MnDOT's efforts for Fiscal Year 2001 to study its contracting market under 49 C.F.R. § 26.45. Pet'r App. at 15. At the conclusion of that analysis, the Eighth Circuit found that MnDOT's reliance on the NERA study to fulfill its 49 C.F.R. § 26.45 obligations was justifiable and that the program was constitutional as applied. Pet'r App. at 16. Because there is no evidence that MnDOT applies the TEA-21 DBE program to projects not funded by TEA-21, the Eighth Circuit reached the same conclusion as the other circuits. Therefore, there is no conflict among the

circuits as to application of the compelling interest prong of strict scrutiny to states implementing a federal race-conscious program.

B. The Narrow Tailoring Analysis Of The Eighth Circuit Is Consistent With That Of The Other Circuits.

Sherbrooke rests its criticism of the narrow tailoring analysis conducted by the Eighth Circuit entirely on the fact that the Eighth Circuit did not require MnDOT to independently establish a compelling interest to which the program is narrowly tailored. Pet. at 21-23. This argument is premised on an interpretation of law contrary to every circuit that has considered the issue, as discussed above, and on a misunderstanding of the regulations.

The record here is clear that MnDOT commissioned the NERA study to satisfy 49 C.F.R. § 26.45. Pet'r App. at 15-16. However, contrary to Sherbrooke's understanding of the regulations, MnDOT officials were not required to gather any other evidence of discrimination, including anecdotal evidence of individual acts of discrimination. Pet. at 19-20. MnDOT must only conduct a 49 C.F.R. § 26.45 study, submit the results of that study to USDOT, set its annual goal based on the results of that study as approved by USDOT, monitor its race-neutral participation throughout each year, and adjust its use of contract goals accordingly. *See* 49 C.F.R. §§ 26.45 and 26.51. Also, contrary to Sherbrooke's assertion, the fact that MnDOT personnel are not aware of specific acts of discrimination does not prove "that nobody has discriminated against anyone." Pet. at 18-19. The NERA study and the precipitous drop in DBE participation during Fiscal Year 1999 provide evidence of discrimination. Pet'r App. at 16.

While the other circuits have uniformly held that states implementing a federal program are not subject to

either prong of strict scrutiny, the Eighth Circuit found that the TEA-21 DBE program provides for "substantial discretion" by the recipients in setting annual goals. Pet'r App. at 15. MnDOT intends to exercise any discretion it has in full compliance with every aspect of the regulations and must fully comply in good faith in order to receive TEA-21 funds in the future.[6] Garza Aff. ¶ 6. Therefore, the only question left for the Eighth Circuit to consider was whether the TEA-21 DBE program remains narrowly tailored after MnDOT exercises its discretion in setting its annual goals. Pet'r App. at 15.

The Eighth Circuit analyzed MnDOT's goal-setting methodology for Fiscal Year 2001 and found that MnDOT satisfied the regulations and further found that Sherbrooke failed to establish that MnDOT acted inappropriately in using NERA or relying on the NERA study. Pet'r App. at 16. MnDOT's reliance on the results of the NERA study were further buttressed by MnDOT's evidence of the precipitous drop in DBE participation during Fiscal Year 1999, when MnDOT was enjoined from implementing the previous federal DBE program. Pet'r App. at 16.

The Eighth Circuit fully considered all evidence concerning MnDOT's compliance with the regulations and correctly ruled that the evidence submitted by Sherbrooke was insufficient to show that the TEA-21 DBE program was not narrowly tailored as applied. Pet'r App. at 16. Sherbrooke's evidence regarding MnDOT's annual goal-setting "failed to establish that better data was available or that MnDOT was otherwise unreasonable in undertaking this thorough analysis and in relying on its results." *Id.*

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[6] Evidence of future conduct is relevant because Sherbrooke seeks only prospective injunctive relief here. Sherbrooke fails to explain why review is warranted when the current extension of TEA-21 will expire on April 30, 2004. *See* Surface Transportation Extension Act of 2004, Pub. L. No. 108-202, 118 Stat. 478 (2004).

The Eighth Circuit did not create a conflict with other circuits when it evaluated MnDOT's annual goal-setting methodology. Instead, after acknowledging the rulings of the other circuits, the Eighth Circuit distinguished the TEA-21 DBE program from those considered by the other circuits based on the TEA-21 DBE program's delegation of substantial discretion to the recipient in the duty to measure the recipient's market. Pet'r App. at 11. Therefore, there is no conflict among the circuits as to the application of the narrow tailoring prong of strict scrutiny to a state that implements a federal race-conscious program as a condition of receipt of federal funds. Review of the Eighth Circuit's decision is not warranted here.

II. Certiorari Is Not Warranted Because There Is No Conflict With Relevant Decisions Of This Court.

A. The Eighth Circuit's Decision Is Consistent With The Compelling Interest Analysis In Relevant Decisions Of This Court.

Sherbrooke argues that the decision of the Eighth Circuit regarding its as applied challenge against MnDOT conflicts with this Court's rulings in *City of Richmond v. J. A. Croson Co.*, 488 U.S. 469 (1989) and *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995). Pet. at 18-20. In *Croson*, this Court did not have occasion to consider the evidentiary obligations under strict scrutiny of a state that implements a race-conscious program enacted by Congress. *Croson*, 488 U.S. at 477-78 (city enacted and implemented its own program). However, in its compelling interest analysis in *Croson*, this Court mentioned only the evidence from within the city presented to the Richmond City Council prior to its enactment of the program, except to note that the city could not rely on either the nationwide findings of Congress or the testimony of the city's public works director regarding

discrimination in his hometown, Pittsburgh, Pennsylvania. *Id.* at 499-500. Thus, *Croson* requires examination of only the basis in evidence before the enacting legislative body to support its classification. The Eighth Circuit complied with the compelling interest prong of strict scrutiny as described by this Court in *Croson* when it applied strict scrutiny to the evidence before Congress. Pet'r App. at 9.

In *Adarand*, this Court held that enactments of the Federal Government are subject to strict scrutiny just as the local program was in *Croson*. *Adarand*, 515 U.S. at 205-09 (federal agency implemented program enacted by Congress). Therefore, the Eighth Circuit complied with *Adarand* by complying with *Croson*. With regard to the compelling interest analysis, the Eighth Circuit's ruling is consistent with *Adarand* and *Croson* and does not create a conflict.

B. The Eighth Circuit's Decision Is Consistent With The Narrow Tailoring Analysis In Relevant Decisions Of This Court.

The Eighth Circuit cited the applicable decisions of this Court regarding narrow tailoring analysis and properly applied the facts of this case to that law. Pet'r App. at 11-16. As discussed above, part of that narrow tailoring is accomplished by the requirement that each recipient of TEA-21 funds evaluate its own contracting market and set its annual goal accordingly. A recipient's obligation to be aware of discrimination in its market is limited to conducting the 49 C.F.R. § 26.45 study to set its annual goal and to reduce its use of contract goals throughout each year if it finds race-neutral participation to an extent greater than its original race-neutral estimate. 49 C.F.R. § 26.51(f). The Eighth Circuit's holding, that the TEA-21 DBE program is constitutional as applied by MnDOT, necessarily includes a finding that MnDOT complies with these regulations. Pet'r App. at 16.

Applying strict scrutiny, the Eighth Circuit examined the program after MnDOT set its Fiscal Year 2001 annual goal. Pet'r App. at 11. The Eighth Circuit noted that the decisions of the other circuits considering the strict scrutiny obligations of a state implementing a federal program were decided prior to *Adarand* and contained different regulatory schemes. Pet'r App. at 10. Accordingly, the Eighth Circuit considered the impact of MnDOT's exercise of "substantial discretion" in its narrow tailoring analysis. Pet'r App. at 15. This deeper examination is consistent with *Croson* and *Adarand*. The Eighth Circuit considered this Court's principal narrow tailoring decision, *U.S. v. Paradise*, 480 U.S. 149 (1987), and this Court's most recent relevant decision, *Grutter v. Bollinger*, 539 U.S. 306 (2003). Pet'r App. at 11-12. The Eighth Circuit stated the proper rule of law and applied that law to the record in this case. Sherbrooke's request for this Court to reexamine that record and reapply the facts to the law should be denied.

CONCLUSION

For all the reasons stated above, the petition for a writ of certiorari should be denied.

Dated: April 7, 2004

Respectfully submitted,

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